(3)

No. 90-403

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOSEPHINE A. ANDES,

Petitioner,

vs.

THEODORE R. KNOX,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1.

WHEN PETITIONER'S CLAIM FOR CIVIL DAMAGES UNDER 18 U.S.C. 2520 ARGUABLY ACCRUED IN MISSOURI MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF THE TWO-YEAR STATUTE OF LIMITATIONS UNDER 18 U.S.C. 2520(e), IS THE APPLICABLE STATUTE OF LIMITATIONS FOR DETERMINING WHETHER THE SUIT IS TIME-BARRED: (A) THE FEDERAL STATUTE (18 U.S.C. 2520(e)) OR (B) THE APPROPRIATE MISSOURI STATUTE OF LIMITATIONS (SEC. 516.120, R.S.MO. OR SEC. 516.140, R.S.MO.)?

DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME CIRCUIT COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

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18 U.S.C. Sec. 2520 Recovery of Civil Damages Authorized

(a) In general. Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably in-

curred.

(c) **Computation of Damages.**

(1) [Section on damages for satellite signal interception omitted as not relevant]

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.** A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law

enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Sec. 516.120, R.S.Mo.:

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability

created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

Sec. 516.140, R.S.Mo.:

Within two years: An action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution, or actions brought

under section 290.140, RSMo. An action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation or for liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, and for the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, such act being an act of Congress, shall be brought within two years after the cause accrued.

REPLY ARGUMENT

1.

WHEN PETITIONER'S CLAIM FOR CIVIL DAMAGES UNDER 18 U.S.C. 2520 ARGUABLY ACCRUED IN MISSOURI MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF THE TWO-YEAR STATUTE OF LIMITATIONS UNDER 18 U.S.C. 2520(e), IS THE APPLICABLE STATUTE OF LIMITATIONS FOR DETERMINING WHETHER THE SUIT IS TIME-BARRED: (A) THE FEDERAL STATUTE (18 U.S.C. 2520(e)) OR (B) THE APPROPRIATE MISSOURI STATUTE OF LIMITATIONS (SEC. 516.120, R.S.MO. OR SEC. 516.140, R.S.MO.)?

Defendant's Brief in Opposition has actually raised a third "question presented" which would justify the granting of the Writ of Certiorari: Whether a newly-enacted federal statute of limitations is applicable to causes of action which have arisen prior to enactment of the statute, or whether the appropriate

state statute of limitations existing at the time of the enactment is applicable.

Petitioner has previously argued that under the federal statute, 18 U.S.C. 2520(e), and the decisions in Sohn v. Waterson, 84 U.S. (17 Wall.) 596 (1873); Lewis v. Lewis, 48 U.S. (7 How.) 776 (1849), and Reynolds v. Heartland Transportation, 849 F.2d 1074 (8th Cir. 1988), her suit was timely. Respondent Knox argues that if the federal statute is not applicable, then the controlling Missouri statute of limitations is Sec. 516.140, R.S.Mo. The two-part rationale offered by Respondent is: (1) the tort of invasion of privacy is the most analogous cause of action in Missouri to the federal claim for damages for unauthorized wiretapping; that invasion of privacy is in turn most analogous to defamation cases and therefore the two-year statute of limitations in Sec. 516.140, R.S.Mo., applicable to libel and slander actions,

is applicable to Petitioner's claims in this case, and (2) since wiretapping is an intentional act, and since Sec. 516.140, R.S.Mo., sets the limitation period for intentional torts, Sec. 516.140 is therefore the controlling Missouri statute of limitations.

It is respectfully suggested that Respondent's reliance on this statute and on the cases cited is misplaced. If a Missouri statute of limitations is applicable to Petitioner's claims against Respondent in this matter, the correct statute is Sec. 516.120, R.S.Mo., which provides in pertinent part:

> Within five years:
>
> (4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein

otherwise enumerated;.... [Emphasis added]

The underlying authority for Respondent Knox's reasoning is Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed.2d 440 (1980). This Court held at 446 U.S. at 483-84, 100 S. Ct. at 1794-95:

> Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under Sec. 1983--a void which is common in federal statutory law. When such a void occurs, this Court has repeatedly "borrowed" the state law of limitations governing an analogous cause of action.

Respondent Knox then cites Smith v. Esquire, Inc., 494 F. Supp. 967 (D. Md. 1980) as persuasive authority for the application of the two-year Missouri defa-

mation statute of limitations. As noted by Respondent Knox, this case arose out of a "false light" invasion of privacy theory--and the Supreme Court of Missouri has expressly rejected that theory as a viable tort in this state. Sullivan v. Pulitzer Broadcasting Company, 709 S.W.2d 475, 480-81 (Mo. 1986) (en banc).

The second authority cited by Respondent Knox is Fleury v. Harper & Row, Publishers, 698 F.2d 1022 (9th Cir. 1983). A reading of the facts in that case suggests that the book which was at issue contained defamatory matter about the plaintiffs (thus generating the libel count) and thus the invasion of privacy theory would appear to be "false light" rather than the other theories of recovery included within "invasion of privacy" which involve publication of truthful but private matters. This, combined with the fact that the application of the defamation statute of limitations was based on

a California appellate decision cited in Fleury at 1027, makes the case of little relevance to Respondent's argument.

The key to the irrelevancy of both of these citations is that they involve defamation, whereas Petitioner's claims are based on a disclosure that was truthful, i.e., the wiretapped telephone conversations did in fact occur, but the disclosure was unauthorized, i.e., Petitioner believed her conversations were private and did not consent to their taping or disclosure to any third parties.

Respondent also cites Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942) as support for Respondent's comparison of invasion of privacy to defamation, and thus leading to Respondent's conclusion that the Missouri defamation statute of limitations is applicable to this case. It should be noted, however, that the Barber court, at 293, also commented upon the similarity of the right of privacy to

the right to be free from unwanted intentional physical contact:

> The interest which one has to maintain his privacy and to live an individual life, which is the basis of the rule, is similar to the much more strongly protected interest to have one's person free from unwanted intentional physical contacts by others. In some aspects it is similar to the interest in reputation, which is the basis of an action for defamation, since both interests have relation to the opinions of third persons.

However, there is a substantial difference between publication of truthful matters and publication of defamatory matters, and in both Barber and the instant case, the publication was of truthful information: in Barber it was the publication of photographs of plaintiff in a hospital bed with accompanying text iden-

tifying her and commenting upon her condition, while in the instant case it was the disclosure to Respondent Knox and others of supposedly private telephone conversations of Petitioner.

Respondent Knox is correct that no decision of an appellate court in Missouri has addressed the issue of what statute of limitations applies to the tort of invasion of privacy. But Missouri does have an all-encompassing statute of limitations for causes of actions which are not specifically enumerated by the state legislature: the five-year limitation period specified by Sec. 516.120(4), R.S.Mo. The language of that statute is express and precise and unambiguous: it covers all causes of action relating to injuries to the person or rights of another which are not otherwise specifically listed.

No Missouri decision has been cited by Respondent to suggest that the appel-

late courts of this state either have, or would, interpret Sec. 516.140, R.S.Mo. as a statute of limitations to cover every conceivable intentional tort.

Part of the reason for this lack of authority is that Sec. 516.120, R.S.Mo., has been applied for many years to a wide variety of causes of action which were not specifically identified by the Missouri legislature and given a specific period of limitation.

In J.D. v. M.F., 758 S.W.2d 177 (E.D. Mo. App. 1988), the Eastern District of the Missouri Court of Appeals expressly held at 178 what has been obvious from many years of litigation: "Tort actions which are not specifically enumerated by name in other sections come under Sec. 516.120(4)...." The application of this principle barred plaintiff's claims for personal injuries resulting from her father's sexual abuse while she was a minor, since she filed suit more

than nine years after attaining her majority, rather than within five years.

A brief sampling of other cases applying the five-year statute to torts not specifically enumerated is as follows: Brower v. Davidson, Deckert, Schutter & Glassman, P.C., 686 S.W.2d 1 (W.D. Mo. App. 1985) [attorney/accountant malpractice]; Jones v. Rennie, 690 S.W.2d 164 (E.D. Mo. App. 1985) [slander of title]; Rippe v. Sutter, 292 S.W.2d 86 (Mo. 1956) [conspiracy]; Farrow v. Rodrique, 224 S.W.2d 630 (S.D. Mo. App. 1949) [alienation of affections].

It is respectfully suggested that the case law in Missouri is crystal clear that claims sounding in tort for which periods of limitation are not specifically enumerated in Ch. 516, R.S.Mo., are governed by the five-year statute of limitations in Sec. 516.120(4), R.S.Mo., and thus Petitioner's suit was timely under the applicable Missouri statute of limi-

tations.

Petitioner agrees with Respondent's statement of the principle that this Court may affirm a lower court's decision on any ground supported by the record, even though the issue might not have been pleaded, tried, or otherwise referred to in the case below. Blum v. Bacon, 457 U.S. 132, 137 (note 5), 102 S. Ct. 2355, 2359, 72 L. Ed.2d 728 (1982); Bondholders Committee, Marlborough Investment Co. v. Commissioner of Internal Revenue, 315 U.S. 189, 192 (note 2), 62 S. Ct. 537, 539 (1942).

The converse of that principle should also hold true: where there is no support in the record for a lower court's decision, that decision should be reversed. The trial court in this case ruled that the "applicable" statute of limitations barred Petitioner's suit. [Petitioner's Appendix at 16] The only statutes of limitation argued to the

trial court were the federal statute (18 U.S.C. 2520(e)), and the two Missouri statutes (Secs. 516.120 and 516.140, R.S.Mo.). The Eighth Circuit affirmed the District Court's decision "for the reasons set forth in the district court's opinion." [Petitioner's Appendix at 4; 905 F.2d at 190]. Under the decisions in Sohn, Lewis and Reynolds, supra, (cited and argued in the Petition for a Writ of Certiorari), Petitioner's suit was timely under the federal statute. As demonstrated above, Petitioner's claim was timely under the only relevant Missouri statute of limitations.

Given the erroneous application of the law by both the District Court and the United States Court of Appeals for the Eighth Circuit, this is a case well within the ambit of both United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936) [holding that appellate courts may take notice of errors not ob-

jected to if the errors are obvious if they "otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings"], and Singleton v. Wulff, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877 49 L. Ed.2d 826 (1976) [holding that federal appellate courts may resolve issues not passed on below in circumstances including, but not limited to, matters where the "proper resolution is beyond any doubt" or where "injustice might otherwise result...."].

The proper resolution of this case should be beyond any doubt where the facts demonstrate both the federal and Missouri statutes of limitations were incorrectly applied by the courts below, and to deprive Petitioner of an opportunity to present her claims to a jury in such circumstances is clearly an example of injustice which "seriously affects the fairness, integrity or public reputation of judicial proceedings."

It is therefore respectfully suggested that the Petition for a Writ of Certiorari be granted.

2.

DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

The question above is the one presented to the Court in the Petition for a Writ of Certiorari. As required by the Rules of this Court, Petitioner will not re-argue the matters previously raised. This portion of the reply will therefore be confined to two points:

1. The excerpts in Respondent's

Appendix from various court documents in both the federal courts below and in the Circuit Court of Jackson County, Missouri, when read in context with the information provided by Petitioner in her Appendix, simply show that Petitioner was aware that her husband, acting alone or possibly through someone else, had wiretapped her telephone and provided that information to her husband's attorneys. At that point in time there was no reason for her to believe that Respondent Knox was involved in the wiretapping, and nothing Respondent has provided to the Court clearly shows that Petitioner either knew or should or could have known of Respondent's involvement in the wiretapping prior to December of 1987. Respondent argues that it is "Petitioner's burden to bring forth sufficient evidence to allow a reasonable jury to find in her favor." [Respondent's Brief at 12] That is precisely what Petitioner is asking

for the opportunity to do--an opportunity which has thus far been foreclosed by the lower courts' decisions.

2. Respondent notes [Respondent's Brief at 19, footnote 2] that Respondent was acquitted of the federal criminal charges against him arising out of the wiretapping incident. Respondent offers no case law to suggest that this event has any relevance to the civil proceedings, or would be dispositive (or even admissible) since the mere act of wiretapping without authorization gives rise to civil damages.

For the reasons previously stated in the Petition, it is respectfully suggested that the Petition for a Writ of Certiorari should be granted.

CONCLUSION

For all the reasons stated above, as well as in the Petition, Petitioner prays that the Court grant her Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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